FILED
United States Court of Appeals
Tenth Circuit

April 3, 2015

Elisabeth A. Shumaker
Clerk of Court

**UNITED STATES COURT OF APPEALS**

**FOR THE TENTH CIRCUIT**

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In re:

TERRY DALE LOMACK,

Movant.

No. 15-6034
(D.C. No. 5:03-CV-01008-C)
(W.D. Okla.)

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**ORDER**

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Before **BRISCOE**, Chief Judge, **EBEL** and **MORITZ**, Circuit Judges.

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Terry Dale Lomack moves for authorization of a second or successive 28 U.S.C. § 2254 application. Mr. Lomack asserts that the principal witness against him, victim Darrell Ray Shaver, has recanted his testimony. Mr. Lomack supports his motion with an affidavit and testimony by Mr. Shaver before the Oklahoma trial court that the prosecutor induced him to testify falsely against Mr. Lomack.

To obtain authorization, Mr. Lomack must make a prima facie showing that "the facts underlying [his] claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found [him] guilty of the underlying offense." 28 U.S.C. § 2244(b)(2)(B)(ii), (b)(3)(C). Our role at this stage is to make a "preliminary assessment" based on the application. *Case v. Hatch*, 731 F.3d 1015, 1029 (10th Cir.), *cert. denied*, 134 S. Ct. 269 (2013). A "prima facie showing" sufficient for authorization of a new evidence claim is "a sufficient

showing of possible merit to warrant a fuller exploration by the district court." *Id.* at 1028-29 (internal quotation marks omitted).

From the limited record before us, it appears that Mr. Shaver's testimony was crucial to convicting Mr. Lomack. This court has recognized that "[a] conviction obtained by the introduction of perjured testimony violates due process if (1) the prosecution knowingly solicited the perjured testimony or (2) the prosecution failed to correct testimony it knew was perjured." *United States v. Vaziri*, 164 F.3d 556, 563 (10th Cir. 1999). Mr. Lomack's allegations suffice to warrant fuller exploration by the district court. Accordingly, we authorize him to file his proposed § 2254 application predicated on Mr. Shaver's recantation. This authorization, of course, "is only a preliminary determination that a claim satisfies the statutory conditions; it is for the district court, under § 2244(b)(4), to confirm that the petition does, in fact, satisfy the requirements of § 2244(b) when it hears the case (and to summarily dismiss if the requirements are not met)." *Ochoa v. Sirmons*, 485 F.3d 538, 543 (10th Cir. 2007) (per curiam) (brackets and internal quotation marks omitted).

The motion for authorization is granted. This grant of authorization "shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari." 28 U.S.C. § 2244(b)(3)(E).

Entered for the Court

ELISABETH A. SHUMAKER, Clerk

No. 15-6034, In re Lomack

BRISCOE, Chief Judge, dissents and would deny authorization.